



State of Wisconsin \

SEP 06 1985 |

DEPARTMENT OF HEALTH AND SOCIAL SERVICES

DIVISION OF COMMUNITY SERVICES

August, 1985

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To: Executive Directors
Developmental Disabilities Councils

From: Marion Bates, Staff
Wisconsin Council on Developmental Disabilities

Re: STATE ZONING LEGISLATION SURVEY

On July 1, 1985, the United States Supreme Court, in Cleburne Living Center v. the City of Cleburne, Texas, ruled that the city's zoning ordinance which excluded a group home for mentally retarded persons from a multi-use zone is a form of irrational prejudice and invalid under the equal protection clause of the Fourteenth Amendment to the United States Constitution. However, the court held that mental retardation was not a quasi-suspect classification requiring "heightened scrutiny-" legislation affecting the mentally retarded need only be rationally related to a legitimate governmental purpose. This standard allows government both to pursue policies to assist the retarded and to engage in activities that burden them in only an incidental manner. For a summary of the case, see Constitutional challenges, pages 36-41.

According to the court, lawmakers have been addressing the difficulties of the mentally retarded "in a manner that belies a continuing antipathy or prejudice and a corresponding need for more intrusive oversight by the judiciary"The court has spoken; but pockets of prejudice remain to be overcome, as this survey revision will indicate. Moreover, the considerable gains were not facilely achieved, but were hard-fought, hard-won battles. Generally, passage required three separate legislative sessions, and another three to defeat attempts to weaken the legislation.

Although zoning legislation allowing group homes for persons with physical and mental impairments in residential areas passed the Kansas Assembly, the bill died in the Senate committee, the victim of opposition to persons with mental impairments. Amendments to strengthen Florida's law passed the Assembly, but the bill was withdrawn by its sponsor when the Senate committee, yielding to lobbying of the League of Cities and Homeowners' Association, attached a restrictive covenant amendment. Louisiana defeated three separate amendments to weaken its zoning law.. The amendments attacked the definition of community homes for six or fewer mentally retarded individuals (and two live-in staff) as single-family units.

For an equal protection clause challenge to Louisiana's zoning laws (Clark v. Manuel, 1985), see the ruling of the Louisiana Supreme Court, citing the opinion of CCA-5 in the Cleburne case, on p. 34. The ruling in Clark v. Manuel was instrumental in the defeat of the amendments.

Another interesting constitutional challenge arose in Connecticut when a Greenwich Tax Review Board reduced assessments for houses near a group home for mentally ill adults (p. 43).

There was good news. After five years of legislative indifference, Missouri attained state zoning legislation. They credited their success to hard work.

It's a first, but state zoning legislation passed "surprisingly easily" in Texas, according to the Developmental Disabilities Council legislative staff. A "family home" (six disabled persons, regardless of legal relationship, and two supervisory personnel) for the disabled is permitted in all residential zones or districts in the state. "Disabled" embraces physical or mental impairments, defined comprehensively.

Amendments to West Virginia's law newly opens single-family and duplex zones to group residential facilities, but a conditional or special use permit is allowable in single-family zones if the home is to be occupied by more than six persons with developmental disabilities (and three supervisors) or behavioral disabilities.

In Pennsylvania, a concurrent resolution, adopted in the 1985 legislative session, urged all municipalities to review their ordinances to facilitate state policy that the developmentally disabled, physically disabled, elderly, mentally ill, and children enjoy the benefits of community residential surroundings.

Due to a legislative logjam, zoning legislation in Alabama failed to move out of committee, but will be reintroduced in the next session. Florida, too, plans reintroducing its amendments in the next session, this time starting in the Senate. A zoning coalition is already at work, talking to legislators.

With the Developmental Disabilities Councils as the instigators, movers, and shakers, thirty-three states (66 percent) and the District of Columbia have achieved state zoning laws, more than half since 1978. This brings into sharp focus the progress made in the past decade in integrating persons with developmental disabilities into the mainstream of society by making community residential opportunities available in residential areas, thereby enhancing the quality of their lives and the communities in which they reside.

STATE ZONING LEGISLATION; A PURVIEW
WISCONSIN COUNCIL ON DEVELOPMENTAL USABILITIES

Madison, Wisconsin

Marion V. Bates

August, 1985

ACKNOWLEDGEMENTS

I would like to express appreciation for the assistance received in preparing this report. Laws, bills, and court decisions came from the fifty state Councils on Developmental Disabilities, as well as considerable verbal background and information from the Council executive directors and Council staffs.

The Regional Developmental Disabilities Information Center (RDDIC), Madison, Wisconsin, provided a wide array of studies in books, monographs, and pamphlets. The RDDIC houses the largest developmental disabilities collection in the country.

The National Center for Law and the Handicapped, Inc., South Bend, Indiana, generously shared their legal monograph, "Community Living: Zoning Obstacles and Local Remedies."

Above all, a special credit and thanks is due the Project Director of the American Bar Association's Developmental Disabilities State Legislative Project, Washington, D.C. for permission to excerpt invaluable material from their study.

"Nothing that is a matter of statewide concern can be a municipal affair. Altered conditions of society can change what once was a municipal affair into a matter of general state concern."

The present decade has witnessed a dramatic shift in social, legal, and political views of handicapped persons. The historic approach to residential services through custodial supervision in an institutional setting has been supplanted by a declared public policy of integration into the mainstream of society through the normalization process.

Successful deinstitutionalization, however, is dependent upon the availability of appropriate community living arrangements; and the supply has been incommensurate to the need.

Exclusionary zoning ordinances are a major hurdle on the obstacle course to implementing public policy. Moreover, the lack of facilities in suitable locations deprives the handicapped of opportunities for services, employment, social activities, and association with others.

As noted by Youngblood and Bensberg, 250,000 mentally retarded persons now reside in public institutions at an annual cost to taxpayers of more than \$1 billion. Probably half of these could be returned to the community. Many would eventually be able to enter competitive employment, earning an average \$3,000 per year, and supporting themselves either fully or partially. Moreover, community residences provide income to the community when residents spend for food, clothing, furniture, and recreation.

Hurdles

Local zoning ordinances have expressly barred group homes from single-family residence zones, though these areas would be the most desirable setting for normalization. A narrow definition of 'family' as a housekeeping unit related by blood, marriage, or adoption, or a limit on the number of unrelated persons allowed in a housekeeping unit may also exclude a group home from single-family neighborhoods." Occasionally, local zoning boards designate group homes, particularly if state-operated and funded, as a business use of land, thus limiting them to commercial and industrial zones. "Elsewhere group homes are allowed only in areas where hospitals or nursing homes are permitted."

Another restrictive device may be the "special or conditional use" permit. It is discretionary administrative permission for uses compatible with the prescribed zone, which may be subject to regulation for the health and welfare of their residents. Its purpose is to enable a municipality to exercise some measure of control over the extent of certain uses which, "although desirable in a limited number, could have a detrimental effect on the community in large numbers." Generally, before a special use permit is granted, all neighbors are invited to attend a public hearing. Substantial opposition can defeat the permit.

Zoning barriers are not the only ones, of course. Related deterrents include a lack of suitable dwellings and insufficient allocation of funds to the communities to implement the public policy.

Three corrective or preventive remedies for zoning obstacles have been applied throughout the nation: municipal zoning code revision, judicial action, and state zoning legislation.

In recent years some municipalities have revised their zoning codes in order to treat community living arrangements more appropriately. The piecemeal approach, however, has evident limitations. In some communities, resistance precludes change; and disparate policies and regulations are the hodgepodge result.

Judicial Action

In using the judicial process to overturn adverse zoning board decisions, advocacy groups have been successful with two arguments:

1. Community residences function as single housekeeping units, operate similarly to traditional families, and therefore should be considered families for zoning purposes.
2. Local zoning codes cannot contravene an overriding state policy that explicitly or implicitly supports the establishment of community residences.

States operating under the constitutional home rule usually have constitution provisions limiting the authority of the legislature to intervene in municipal affairs. The California Supreme Court has ruled, however, that general law prevails over chartered city enactments where the subject matter of the general law is of statewide concern. This is to be determined from the legislative purpose of the state law.

Zoning restrictions have been challenged successfully under the "due process" and "equal protection" clauses of the 14th Amendment to the United States Constitution and under similar guarantees in state constitutions.

Adjudication can be expensive in time and dollars. Furthermore, decisions often are not so definitive or final that issues are resolved permanently. Hence, a growing number of states are turning to the third remedy: state preemptive legislation allowing community residential facilities in residential areas.

State Zoning Roundup*

Thirty-three states and the District of Columbia (66 percent) now have state zoning laws.

* For chart of Statutory Citations, see Appendix, p. 1

Laws were enacted in California, Colorado, Minnesota, Montana, and New Jersey prior to 1977. Michigan, New Mexico, Ohio, Rhode Island, and Virginia joined the ranks in 1977. Arizona, Maryland, New York, South Carolina, Tennessee, Vermont, and Wisconsin followed in 1978, and New Jersey strengthened its law in 1978. The roster added Connecticut and Idaho in 1979; Delaware, Florida, Indiana, Nebraska, and West Virginia in 1980; Louisiana, Nevada, North Carolina, Utah, and the District of Columbia in 1981; Hawaii and Maine in 1982; Iowa, South Carolina amendments, and strengthened legislation in Louisiana in 1983; and West Virginia amendments and Missouri and Texas statutes in 1985.

In the Hopper

The Alabama Association of Retarded Citizens supported state zoning legislation in the 1985 legislative session. The bill failed to move out of committee due to a legislative logjam, but will be reintroduced in the next session.

As proposed, the legislation would abolish and prohibit any zoning law, ordinance, or regulation that prevents or prohibits persons with mental retardation from living in a natural residential environment. Zoning ordinances cannot exclude a group home from a residential area solely because the residents are not blood-related unless the group home would be located within 3,000 feet of another group home, as measured between lot lines. The group home may be required to meet all other zoning and licensing requirements of local and state governmental agencies.

The classification of "multi-family residence" (means duplex, triplex, and 4 units or larger) must include any residence in which 10 or fewer unrelated mentally retarded persons may reside. The residence may also include 2 persons unrelated by blood or marriage to each other or any of the residents.

A separate bill was filed regarding housing for persons who are mentally ill.

Alabama has 42 group homes, some operated by the state, and some on state property in association with the Development Center. Two of 42 group homes are 15 beds or fewer Medicaid-approved homes, and one is to be certified as a community ICF/MR for 16 residents, some of whom will be classified as multiply handicapped.

Zoning legislation for persons with physical and mental impairments passed the Kansas House in the 1985 session, but died in the Senate committee. The stumbling block was opposition to the inclusion of mental impairments.

Seventeen states (34 percent) have no state zoning laws. They are:

Alabama	Massachusetts	Pennsylvania
Alaska	Mississippi	South Dakota
Arkansas	New Hampshire	Washington
Georgia	North Dakota	Wyoming
Illinois	Oklahoma	
Kansas	Oregon	
Kentucky		

Local Hegemony

Georgia, Illinois, and Kentucky are home rule states in which zoning is a local issue. Similarly, it is a local issue in Arkansas, Connecticut, Indiana, New Hampshire, and South Dakota.

In Arkansas state zoning legislation for group homes has not yet developed as an issue, and a creditable number of group homes have been established. Four counties revised their laws to permit group homes in residential areas.

Low key is New Hampshire's strategy. Quietly, key community leaders are contacted—the mayor, town manager, police. Their support and influence is instrumental in gaining community acceptance of group homes.

Mississippi and Oklahoma indicated that zoning is not an issue. In Mississippi, group homes were started by the Department.

The Superior Courts

In Massachusetts, the judicial rather than the legislative approach has proved more effective. Two bills (House Nos. 2025 and 4282, January 1977) were amended beyond recognition to the extent that advocacy groups preferred to turn to the courts than to support a sham measure. In fact, they worked successfully to have the bills die in committee.

Legislation, in effect, was rendered moot by the decision of the Massachusetts Appeals Court in Harbor Schools v. Board of Appeals of Haverhill on August 19, 1977. A community residence for the mentally disabled, the court ruled, is a "public educational use" and therefore exempt from local zoning regulation under state law (General Laws, Chapter 40A).

The Appeals Court adopted a broad view of the term "education," reaffirming a judicial definition first expressed almost 100 years ago. Rejecting the contention that the facility provided "rehabilitation" but not "education," the court declared the terms not mutually exclusive and rehabilitation one aspect of education. Any aspect of a program that seeks to "develop and train the powers and capabilities" and the "mental, -moral or physical powers and faculties" constitutes an educational purpose. The decision of this state intermediate appellate court is binding on all lower courts.

New York has also fared well in the courts. In City of White Plains v. Ferraioli (1974), the New York Court of Appeals upheld the right of a group home for developmentally disabled persons to locate in a single-family residential area as long as the family unit was a relatively permanent household and not a framework for transient living. Nor was the New York Supreme Court, Appellate Division, 2nd Department in The Little Neck Community Associations et al. v. Working Organization for Retarded Children, May 3, 1976, persuaded that a group home for retarded children would alter the quality of life or character of the neighborhood. Rather, it would provide a stable environment in which the children would have a real opportunity to develop their full potential.

The State Laws

Arizona

State zoning legislation became law on June 7, 1978 (see Article 2, Title 36, Chapter 5, Arizona Revised Statutes).

A residential facility serving six or fewer developmentally disabled persons, and providing twenty-four hour daily care, is a permitted use in areas zoned for single-family residences. The total, including the operator, members of his family, or staff, may not exceed eight.

"Residential facility" is defined as a home in which persons with developmental disabilities live, and which is licensed, operated, supported, or supervised by the Department.

"Developmental disability" is defined to include autism, cerebral palsy, epilepsy, and mental retardation.

No residential facility may be established within a 1,200 foot radius of an existing one in a residential area.

Prior to establishing a facility, the Department must give at least sixty days' written notice to the affected local government unit, which has a right to file written objection within thirty days and to request and administrative hearing.

Residential facilities serving seven or more persons are permitted use in any zone in which buildings of similar size are rented as apartments or rooms. Conditional use permits for residential facilities may not impose conditions more restrictive than those applicable to similar dwellings in the zone.

California

The California Welfare and Institutions Code (Sec. 5116) provides that a state authorized, certified, or licensed family care home, foster home, or group home serving six or fewer handicapped children shall be considered residential property for zoning purposes, if care is provided on a 24-hour-a-day basis. The homes are permitted in all residential zones, including single-family zones. Use permits may be required, but conditions more restrictive than those on similar dwellings may not be imposed, unless necessary to protect the health and safety of the residents.

This statute was upheld by the California Superior Court in City of Los Angeles v. California Department of Health,

Colorado

Two different sections of the Colorado statutes were amended in 1976: Section 30-28-115, declaring group homes for the aged to be a residential use of property; and Section 27-10.5-102, concerning group homes for the developmentally disabled.

The first declares the establishment of group homes for the exclusive use of not more than eight persons age 60 or older per home to be a matter of statewide concern. It further attests to a state policy of assisting those who do not need skilled or intermediate care facilities to live in normal residential surroundings, including single-family units, if they so choose.

Municipal zoning ordinances are required to provide for group homes for the elderly. The homes must be located at least 750 feet apart unless the municipality opts otherwise.

The second statutory amendment defines a group home for the developmentally disabled as a nonmedical residence providing supervision and training, and capable of housing no more than ten developmentally disabled persons.

Homes for more than ten established prior to January 1, 1976 are grandfathered.

"Developmental disability" is defined as a disability attributable to mental retardation, cerebral palsy, epilepsy, autism or neurological impairment, which may have originated during the first 18 years of life, can be expected to continue indefinitely, and constitutes a substantial handicap. It includes, but is not limited to, a disability of a person who has a permanent physical handicap requiring substantial supervision and training.

Connecticut

Chapter 124, Sec. 8-3e prohibits any zoning regulation from treating a community residence licensed by the state and housing six or fewer mentally retarded persons and two staff in a manner different from a single-family residence.

A provision was added in May, 1984, that allows any resident of a municipality in which such a residence is located, with the approval of the municipal legislative body, to petition the Commissioner of Mental Retardation to revoke the license of the residence on the grounds of noncompliance with any statute or regulation concerning the operation of these residences.

An elating victory was achieved on May 9, 1984 with passage by a precarious 15-vote margin of state zoning legislation covering community living for mentally ill adults (Substitute Senate Bill No. 533). The favorable margin, in large measure, was the result of the Governor's strong support and last-minute arm twisting by his staff.

Under the new law no zoning regulation can prohibit a community residence in an area zoned to allow structures containing two or more dwelling units. After July 1, 1984, there is a 1,000-foot dispersal requirement for all new community residences. If more than one community residence is proposed in a municipality, a total density limit of 1/10th of 1 percent of the population applies.

"Community residence" is defined as a facility licensed by the Commissioner of Health Services, that houses 8 or fewer mentally ill adults plus staff and that provides supervised, structured group living activities and psychosocial rehabilitation and other support services to mentally ill adults discharged from a state-operated or licensed facility or referred by a licensed psychiatrist or psychologist.

"Mentally ill adult" is defined as an adult who has a mental or emotional condition that has substantial adverse effects on his/her ability to function and who requires care and treatment. Not included are adults dangerous to self or others, alcoholic, drug dependent, or placed by court order in a community-based residential home, released by the Department of Corrections to a community-based residential home, or any person found not competent to stand trial for a crime.

Any resident of a municipality in which a residence is or will be located may, through the chief executive officer or legislative body of the municipality, petition the Commissioner of Health Services to deny a license application on the grounds that the residence would violate the density and/or dispersal limits.

A license applicant must mail a copy of the application addressed to the Department of Health Services to the Regional Mental Health Board, the Regional Mental Health Director, and the governing board of the municipality. The applications must specify the number of community residences in the community, the address and number of residents in each residence, the address of the proposed residence, and population and occupancy statistics reflecting compliance with the dispersal and density limits.

The Health Services Commissioner cannot issue a license until the applicant has submitted proof that the required mailing has been made and 30 days have elapsed after receipt by all recipients.

A community residence must be evaluated twice a year by the Department of Mental Health. Evaluations must include a review of individual client records and must be sent, upon request, to the Department of Health Services.

Any resident of a municipality in which a residence is located may, with the approval of the municipal legislative body, petition the Health Services Commissioner to revoke the license on grounds of noncompliance with any statute or regulation concerning their operation.

The Department of Health Services, with the advice of the Department of Mental Health, is charged with adopting regulations that include standards for safety, maintenance and administration; protection of human rights; staffing requirements; administration of medication; program goals and objectives; services to be offered; and population to be served.

Delaware

A 1980 law (Chapter 390, Laws of 1979, approved July 11, 1980, amending Title 9, Chapters 26, A9, and 68, and Title 2, Chapter 3 of the Delaware Code) declared it to be state policy that the use of property for the care and housing of ten or fewer persons with developmental disabilities is a residential use of property for zoning purposes.

For purposes of all county zoning ordinances, a residential facility | licensed or approved by a state agency serving ten or fewer developmentally disabled persons on a 24 hour per day basis is considered a permitted single-family residential use of the property.

A 5,000 foot-radius requirement is imposed.

A developmental disability is defined as a disability resulting in substantial functional limitations in major life activities, (1) attributable to mental retardation, cerebral palsy, epilepsy, or autism, (2) attributable to any other condition found to be closely related to mental retardation because the condition results in impairment of general intellectual functioning or adaptive behavior similar to that of mentally retarded persons, or requires similar treatment and services, or (3) attributable to a physical impairment.

District of Columbia

Pursuant to its authority under the District of Columbia Zoning Act (D.C. Code, Sec. 5-413 et seq.), the District of Columbia Zoning Commission issued amended zoning regulations, effective July 9, 1981, defining and regulating community-based residential facilities.

Community residential facilities are defined to include, as one subcategory, group homes for the mentally retarded, housing one or more persons not related by blood or marriage to the residence director, and who are also allowed as a matter of right provided there is no other facility in the same square or within a 1,000 - foot radius.

Under the new regulations, community-based residential facilities housing up to four persons, not including the resident supervisor and family, are allowed as a matter of right in R-1 districts. Facilities for 5-8 persons are also allowed as a matter of right provided there is no other facility in the same square or within a 1,000 - foot radius.

The same provision applies for facilities with 5-8 persons in R-2 districts with the provision that:

- (1) There is no similar facility in the same square to within a 1,000 - foot radius;
- (2) There is adequate, appropriately located, and screened off-street parking for occupants, employees, and visitors;
- (3) The facility meets all code and licensing requirements;
- (A) The facility will not have an adverse neighborhood impact because of traffic, noise, operations, or number of similar facilities in the area.

The Zoning Board may approve more than 1 facility in a square or within a 1,000 - foot radius only if it finds that the cumulative effect will not have an adverse neighborhood impact.

The special exception applies to facilities for 9-15 persons in R2-R4 districts on the same terms with the exception of a 500 - foot radius dispersal limit.

The Zoning Board may approve facilities for more than 15 persons in R2-R4 districts only if it finds the program goals and objectives of the District of Columbia cannot be achieved by a smaller facility and there is no other reasonable alternative.

The Board must submit the application to the Assistance City Administrator for Planning and Development for coordination, review, report, and impact assessment along with written reports of all relevant District departments and agencies, including the Department of Transportation, Human Services, and Corrections, and, if an historic district or landmark is involved, of the State Historic Preservation Officer.

Florida

Florida amended its Local Government Comprehensive Planning Act, [Chapter 163 Florida Statutes at section 163.3177(6)(f)(4)]. One of the required elements of the Comprehensive Plan is a housing element. The amendment (Chapter 80-154, Laws of Florida, 1980) requires counties and municipalities to include standards, plans, and principles for providing adequate sites for group home and foster care facilities in the housing element of their land use plan. If the State objects to the plan because it fails to make such provisions, the local governing authority must respond in writing to the State regarding the objection. It is required that the objection and the response be recorded in the minutes of a public meeting specifically called for the purpose of acting on the comprehensive plan.

The Department of Community Affairs is responsible for administering the act. The Department of Health and Rehabilitative Services assists by reviewing housing elements of the comprehensive plans.

A strong home rule state, Florida maintained this principle by allowing communities to determine how group and foster care facilities will be provided, but the clear legislative intent was to provide for the development of group and foster homes throughout the state.

A bill to strengthen existing legislation, supported by a Zoning Coalition of disability organizations and advocacy groups, passed the House in the 1985 session. It subsequently was killed by its sponsor when the Senate, lobbied by the League of Cities and Homeowners' Association, affixed amendments allowing the use of restrictive covenants by homeowners' associations.

The House bill sought to strengthen compliance by municipalities with the statutory requirement to include standards, plans, and principles for providing adequate sites for group home and foster care facilities in the housing element of their land use plan. Two municipalities were observing the mandate.

The measure will be pursued again in the next session of the legislature.

Georgia

Although Georgia is a home-rule state, the Georgia Council on Developmental Disabilities took the initiative in obtaining a declaration of public policy from the legislature that would advise local communities of the state's commitment to equal opportunity for handicapped citizens and thus make local communities more sensitive to the problems related to inappropriate zoning.

In its resolution (L.R. 54, Act No. 9, April 14, 1981), the legislature, noting that many handicapped persons are unable to live in conventional single-family homes because of the nature of their handicaps, declared it to be state public policy that there should be no discrimination against handicapped persons, and that the laws of the state and its political subdivisions should be enacted with a view toward "making it as easy as possible for handicapped persons to live in a manner similar to other citizens of the state with particular emphasis on residences for handicapped citizens."

Hawaii

A law (Chapter 46, Hawaii Revised Statutes), effective September 1, 1982, allows group living for a maximum of eight unrelated persons and two managers in residential zones. The facility must be licensed by the Department of Social Services and Housing. Previously, county zoning laws prohibited more than five unrelated adults in a residential facility. The law applies to the developmentally disabled, elderly, handicapped, and the totally disabled.

Idaho

The legislature in 1979, by an eighty-percent affirmative vote, passed a law (676-6430-6532, Idaho Code), declaring it to be a state policy that use of property for the care of eight or fewer mentally and/or physically handicapped persons is a residential use for zoning purposes.

Initiated by the Idaho Developmental Disabilities Council, the law provides that the classification "single-family dwelling" includes any home in which eight or fewer unrelated mentally and/or physically handicapped persons reside, and which is supervised. A maximum of two resident staff can live in the home.

The Department of Health and Welfare may require licenses and set minimum standards for providing services or operations. The licensure may be under regulations for shelter homes, intermediate care facilities for mentally retarded or related conditions, or specifically written for these residences.

Conditional use permits, zoning variances, or other zoning clearances not required of single-family dwellings in the same zone are prohibited. The same prohibition applies to local ordinances or other local restrictions.

Indiana

Code Section 16-10-2.1 was amended in 1980 to provide that zoning ordinances may not exclude a group home from a residential area solely because the group home is a business, or because the persons residing therein are unrelated, unless the home is located within 3,000 feet of another group home, as measured between lot lines. The group home may be required to meet all other zoning requirements, ordinances, and laws. Covenants prohibiting the use of property for group homes for persons with developmental disabilities are void as against public policy.

"Group home" is defined as a residential facility licensed by the Developmental Disabilities Residential Facilities Council for not more than eight developmentally disabled persons, none of whom has a history of violent or antisocial behavior, and staff, not to exceed two at any one time, necessary to adequately manage the home.

The requirement does not apply to a county, city, or town planning authority, or a person planning to establish a group home in an area designated for residential use that is under the planning authority's land use control, if, before May 1, 1981, the planning authority develops an alternative plan, approved by the Council, governing the placement of a group home in an area designed for residential use that is under the planning authority's land use control.

The Council must approve an alternative plan submitted by a planning authority, after holding a hearing, if the alternative plan (1) excludes group homes from residential areas that possess unique qualities that would be adversely affected by placing group homes in the area, and (2) demonstrates that there are sufficient placement opportunities in other residential areas under the planning authority's land use control to meet the local need for group homes.

An area does not possess a unique nature solely because it consists of single-family dwellings.

Iowa

Iowa amended its Code in 1983 (Sections 385A.25 and 414.22) to provide that a county, county board of supervisors, or county zoning commission shall consider a family home a residential use of property for zoning purposes and must treat a family home as a permitted use in all residential zones or districts, including single-family. Conditional or special use permits, special exceptions, or variances are not permitted. A density limit of one-fourth of a mile applies to all new family homes.

A restriction, reservation, condition, exception, or covenant in a subdivision plan, deed, or other instrument pertaining to the transfer, sale, lease, or use of property in a county that permits residential use of property but prohibits the use of property as a family home for developmentally disabled persons is void against public policy.

"Family home" is defined as a community-based residential home, licensed as a residential care facility or child foster care facility to provide room and board, personal care, habilitation services, and supervision in a family environment exclusively for not more than eight developmentally disabled persons and necessary support personnel. It does not include an individual foster family home.

"Developmental disability" is defined as a disability that has continued, or can be expected to continue, indefinitely and is attributable to mental retardation, cerebral palsy, epilepsy, or autism; to any other closely related condition that results in similar impairment of general intellectual functioning or adaptive behavior or requires similar treatment and services; to dyslexia resulting from any of these conditions; or to a mental or nervous disorder.

Louisiana

The legislature in the summer of 1981 passed a law (R.S. 28: 475-478) establishing a statewide public policy that community homes for mentally and physically handicapped persons are permitted in all residential areas zoned for multiple family dwellings.

"Handicapped person" is given the functional definition used in the federal developmental disabilities law (P.L. 95-602).

"Community home" is defined as a facility certified, licensed, or monitored by the Department of Health and Human Resources to provide resident services and supervision to six or fewer persons, plus two supervisory personnel. There is a 1,000-foot radius dispersal requirement.

A strong home-rule state, Louisiana requires site approval by the local governing authority. The local sponsor must notify the local governing authority of intent to file an application with the Department to open a community home. In any area over which a local planning commission has jurisdiction, the site selection must first be submitted to the local planning commission, which recommends approval or disapproval. The local governing authority, within 45 days of the original notice to the local planning commission, must affirm or reverse by a majority vote of the members.

In an area in which there is no local planning commission, the local governing authority must approve or disapprove the site within 45 days of the original notice. If the local governing authority disapproves the site, the local sponsor and the Department may develop an alternate site selection that is acceptable to the local sponsor, the local governing authority, and the Department.

The Louisiana legislature in 1983 amended its Mental Retardation and Developmental Disability Law (R.S. 28: 381) to declare that community homes providing for six or fewer mentally retarded or developmentally disabled individuals, with no more than two live-in staff, are considered single-family units having common interests, goals, and problems, whereas a community home providing residential living options for seven to fifteen persons is referred to as a group home.

The law was invoked in two 1983 zoning cases with mixed results. In one case, the district judge upheld the municipality, and the decision was appealed by the local Association for Retarded Citizens. In the second case, the district judge ruled that the legislation allowed the establishment of three community homes in single-family zones. (See Constitutional Challenges, p. 34.)

Maine

A new law (Chap. 640, Laws of 1982, approved April 6, 1982) permits 8 or fewer persons with mental handicaps or developmental disabilities to live in group homes in areas zoned for single-family use. The statute expressly provides that small residential homes are considered single-family households for zoning purposes.

Homes are subject to a 1,500 foot dispersal limit and may not locate in a way that contributes to excessive concentration of group living arrangements within the zone or community.

An application must be submitted to the municipality where the group home, foster home, or intermediate care facility for the mentally retarded is to be located. The municipality reviews the application and notifies residents whose property lines are within a 1,500 foot radius of the proposed site.

A public hearing must be conducted by the body authorized by the municipality to act as a Zoning Board of Appeals to obtain comments on the proposed community living use.

The Board can modify or disapprove the application only upon a finding of one or more of the following:

1. That the proposed use would create or aggravate a traffic hazard;
2. That the proposed use would hamper pedestrian circulation;
3. That the proposed use would not permit convenient access to commercial shopping facilities, medical facilities, public transportation, fire or police protection;
4. That the proposed use would not be in conformance with applicable building, housing, plumbing and other safety codes, including minimum lot size and building set-back requirements for new construction; or
5. That the proposed use would not be consistent with the density limit.

Maryland

Amendments to Maryland's Mental Health Act (Article 59A, Ann. Code), enacted in April, 1978, provide that a public group home and a private non-profit group home shall be permitted in all residential zones, including single-family, and are not subject to a special exception, conditional use permit, or procedure different from that required for a single-family dwelling.

A group home is defined as a community-based residential type facility that admits at least four but not more than eight mentally retarded persons requiring specialized living arrangements and provides for them a home under the care and supervision of responsible adults.

A private group home may not be established until a certificate or approval has been obtained from the Department of Health and Mental Hygiene. Factors to be considered are the nature and character of the area, availability of utilities, and access to transportation, shopping, recreations, and public facilities.

Michigan

"In order to implement the policy of this state that persons in need of community residential care shall not be excluded by zoning from benefits of normal surroundings, a state licensed residential facility providing supervision or care or both, to six or fewer persons shall be considered a residential use of property."

The homes are permitted in all residential zones and may not be subject to a special use of conditional use permit or procedure different from those required of similar density in the same zone.

The amendments to the zoning foster care licensing laws, initially introduced by the Department of Mental Health in 1971, became effective April 2, 1977. Other of its provisions include:

- Homes must provide 24-hours-per-day supervision.

No licenses may be granted to new residential facilities if another state-licensed facility is located within a 1,500 foot radius, unless permitted by local zoning ordinances.

No licenses may be granted in the City of Detroit if another home is located within a 3,000 foot radius.

- Local governments are provided with specific criteria for judging quality of care and are authorized to request that licenses be suspended or revoked if a facility violates zoning laws or ordinances.

The state licensing agency (Department of Social Services) is mandated to resolve complaints within 45 days. Failure to do so would block issuance or continuation of a license.

The amendments are expected to ameliorate a dilemma common to most states—a plethora of local zoning ordinances, all treating facilities inconsistently. Michigan tallied almost 600 zoning commissions and nearly 700 planning commissions, some of which performed the zoning function. The crazy quilt result was such that within a single county, a foster care facility might be permitted in one residential district but excluded from another a mere mile away.

Minnesota

Minnesota's law expressly affirms state policy that mentally retarded and physically handicapped person shall not be excluded by municipal ordinances from residential areas. State-licensed group or foster homes serving six or fewer persons are considered single-family dwellings for zoning purposes. Facilities serving seven to 16 persons are permitted in multi-family zoned areas, but a local conditional use or special use permit may be required in order to assure property maintenance and operations. No more restrictive conditions may be imposed than those on other conditional uses in the same zones, unless the additional conditions are necessary to protect the health and safety of the residents.

No new license may be granted if it would substantially contribute to an excessive concentration of community residential facilities in a town, municipality or county.

The Commissioner of Public Welfare must consider the population, size, land use plan, availability of community services, and number and size of existing public and private residential facilities in the community. The Commissioner may not newly license a facility within 300 feet of an existing one, unless the local zoning authority grants a conditional or special use permit.

Missouri

Missouri's new zoning law (Section 89.020, Missouri Revised Statutes, 1978) defines "single-family dwelling or residence" to include any home in which eight or fewer unrelated mentally retarded or physically handicapped persons live, plus two persons acting as houseparents or guardians who need not be related to each other or to any of the handicapped residents.

The local zoning authority may require the exterior appearance of the home and property to reasonably conform with general neighborhood standards and may establish reasonable density standards in any specific single-family dwelling neighborhood.

A person or entity is expressly prohibited from entering into a contract that would restrict group homes or their location in these neighborhoods.

The legislation was awaiting the Governor's signature as of July 1, 1985.

Montana

A community residential facility serving eight or fewer persons is considered a residential use of property for zoning purposes if the home provides 24-hour daily care. The homes are permitted in all residential areas.

A community residential facility is defined to include: (1) a group, foster, or other home provided as a residence for developmentally disabled or handicapped persons who do not require nursing care; (2) a district youth guidance home; (3) a halfway house for rehabilitation of alcoholics or drug dependent persons; or (4) a licensed adult foster family care home.

The Montana statute was challenged in 1975 in *State ex rel. Thelen v. City of Missoula*. A Missoula zoning ordinance defined "family" so as to prohibit the owners of property in a single-family zone from selling it to a group that intended to use it as a community residential facility.

The Montana Supreme Court spoke: "The legislature having determined that the constitutional rights of the developmentally disabled to live and develop within our community structure as a family unit, rather than be segregated in isolated institutions, is paramount to the zoning regulations of any city, it becomes our duty to recognize and implement such legislative action."

Nebraska

A group home serving four to eight persons, not including resident managers or houseparents, may be located in any residential zone subject to dispersal and density limits. The eligible occupants are persons receiving therapy, training, or counseling for purposes of adapting to living with, or undergoing rehabilitation from, autism, cerebral palsy, or mental retardation.

The state may not license a new home within 1,200 feet of an existing one unless the governing body of a municipality grants a conditional or special use permit. A metropolitan-class city by ordinance may prohibit a new home within one-half mile of an existing facility. These dispersal requirements apply also to correctional homes and those serving persons recuperating from the effects of drugs of alcohol, mental illness, or physical disability.

Density limits are as follows:

<u>Population</u>	<u>Number of Homes</u>
1,000 or fewer	1
1,001 - 9,999	1 for every 2,000
10,000 - 49,999	1 for every 3,000
50,000 - 249,999	1 for every 10,000
250,000 -	1 for every 20,000

A municipality's governing body may issue a variance to allow additional group homes.

Nebraska's law (S. 18-1744-1747, Neb. Rev. Stat., 1980 Suppl.) became effective July 19, 1980.

Nevada

A law enacted in May, 1981 (Chapter 154, Laws of 1981) is designed to remove obstacles imposed by zoning ordinances that prevent mentally retarded persons from living in normal residences.

In any ordinance adopted by a city or county, the definition of single-family residence must include a home in which six or fewer unrelated mentally retarded persons live with one or two additional persons as houseparents or guardians, who also need not be related to each other or any of the retarded persons.

The law does not prohibit a definition that allows more persons to live in the house, nor does it prohibit regulation of commercially operated homes.

New Jersey

Under a new law (Chapter 159, Section 40:55D, Laws of 1978), passed November 21, 1978, community residences for the developmentally disabled are a permitted use in all residential districts.

A conditional use permit may be required if the community residence houses more than six persons, excluding staff.

A conditional use permit may be denied if the proposed residence would be located within 1,500 feet of an existing residence; or if the number of developmentally disabled and mentally ill persons living in existing community residences exceeds 50 persons or 0.5 percent of the municipality, whichever is greater.

A community residence for the developmentally disabled is defined as a facility licensed under P.L. 1977, Chapter 433 (C. 30:11B-1 et seq.) providing food, shelter and personal guidance under such supervision as required, to not more than fifteen developmentally disabled or mentally ill persons who require temporary or permanent assistance in order to live in the community.

These residences include, but are not limited to, group homes, half-way houses, intermediate care facilities, supervised living arrangements, and hostels.

New Mexico

All state-licensed or state-operated community residences for the mentally ill or developmentally disabled serving ten or fewer persons now are considered a residential use of property for zoning purposes and permissible in all residential zones, including single-family particularly.

New York

A procedure for site selection of community residential facilities became effective on September 1, 1978. The provisions are found in new section 41.24 of the mental hygiene law (Chapter 468, Laws of 1978), enacted July 6, 1978.

The law covers any community facility operated or subject to licensure by the Office of Mental Health or Office of Mental Retardation and Developmental Disabilities that provides a supervised residence for four to fourteen mentally disabled persons.

Consistent with the legal precedent established in *City of White Plains v. Ferraioli* (1974), a community residential facility is defined as a "family unit."

1. A sponsoring agency that plans to establish a facility must send a written notice of intent to the municipality's chief executive officer.

The agency may recommend one or more sites that meet the requirements of the program.

The notice must describe the nature, size, and community support requirements of the program.

The notice of intent is a condition precedent to issuance of an operating certificate. A certificate issued without compliance with the notice of intent requirement is null and void, and continued operation may be enjoined.

2. The municipality has 40 days after receiving the notice to (1) approve one of the sites recommended by the sponsoring agency; (2) suggest one or more suitable sites, or an area; or (3) object on the basis of overconcentration that would substantially alter the nature and character of the area.

Prior to responding, the municipality may hold a public hearing. The response is sent to the sponsoring agency and the commissioner.

If the municipality does not respond within 40 days, the sponsoring agency may establish a residence at a site recommended in its notice; or, if none is recommended, at site it selects.

3. If the municipality approves a site recommended by the sponsoring agency, the sponsoring agency must try to establish a facility at the approved site.

If the sites or areas suggested by the municipality are satisfactory as to nature, size, and community support, and are not already overly concentrated with community residential facilities, the agency must try to establish its facility at one of the sites or within the area designated by the municipality.

If the sponsoring agency notifies the municipality that the suggested sites are unsatisfactory, the municipality has 15 days to suggest alternative sites or areas.

4. If the municipality objects to establishing a facility therein on grounds of overconcentration, or the sponsoring agency objects to the area(s) suggested by the municipality, or if the municipality and agency cannot agree upon a site, either one may request an immediate hearing before the commissioner to resolve the issues.

The hearing must be conducted within 15 days of the request.

5. The commissioner must make a determination within 30 days of the hearing.

The commissioner must sustain the objection if he determines that the nature and character of the area would be substantially altered.

6. The commissioner's decision is subject to review if sought within 30 days of the determination.

North Carolina

Chapter 168 of the General Statutes was amended, effective June 12, 1981, to allow family care homes for handicapped persons in all residential districts of all political subdivisions.

"Handicapped person" is defined as one with a temporary, or permanent physical, emotional, or mental disability including, but not limited to, mental retardation, cerebral palsy, epilepsy, autism, hearing and vision impairments, emotional disturbances, and orthopedic impairments. Mentally ill persons who are dangerous to others, as defined in General Statutes 122-58.2(1)b, are not included.

"Family care home" is defined as a home with support and supervisory personnel that provides room and board, personal care, and habilitation services in a family environment for not more than 6 resident handicapped persons.

Political subdivisions may not require a conditional or special use permit, special exception, or variance from a zoning ordinance.

However, they may prohibit a family home from locating within a one-half mile radius of an existing family care home.

Any restriction, reservation, condition, exception, or covenant in any subdivision plan, deed or other instrument pertaining to the sale, lease, or use of property that would allow residential use of the property, but prohibit its use as a family care home, is expressly declared void as against public policy.

Ohio

Family care homes of no more than eight persons with developmental disabilities are permitted in all residential zones.

Group homes for nine to sixteen persons with developmental disabilities who require personal care and supervision may locate in all residential zones, except they may be excluded from planned unit development districts. A special exception or use permit may be required.

"Developmental disability" is defined as the federal law, the Developmentally Disabled Assistance and Bill of Rights Act (Public Law 94-103).

"Developmental disability" means one that originated before age 18, can be expected to continue indefinitely, constitutes a substantial handicap to the person's ability to function normally in society, and is attributable to mental retardation, cerebral palsy, epilepsy, or autism, and any other condition closely related to mental retardation because it results in similar impairment of general intellectual functioning or adaptive behavior or requires similar treatment or services.

Pennsylvania

Although Pennsylvania does not have state zoning legislation allowing group homes in residential areas, a concurrent resolution, adopted in the 1985 legislative session, reaffirmed state policy that people who are developmentally disabled, mentally retarded, mentally ill, physically disabled, elderly, and children shall enjoy the benefits of community residential surroundings. They further urged all municipalities to review their ordinances to assure that they facilitate the achievement of this policy.

The resolution noted that:

1. Citizens who are unable to live independently without special care and supervision generally achieve higher functioning levels when living in home-like settings in the community rather than in large institutions.
2. Living facilities for these citizens have for years tended to be located in isolated places with few opportunities for regular integration with others living in the community.
3. Successful community integration is dependent upon an increased availability of appropriate, well-supervised, small community residential facilities.
4. Numerous studies have demonstrated that small community residential facilities have no adverse impact on neighboring property values.
5. Small community living arrangements have been recognized in court decisions as the functional equivalent of biological families.
6. It is costly, both to service providers and municipalities, to have to resort repeatedly to the courts to redress zoning obstacles to establish small community residential facilities.
7. It is primarily the responsibility of municipalities through their zoning powers to permit the establishment of these facilities in all residential zones.

A model local zoning ordinance is available through the Allegheny County Department of Development.

Rhode Island

Whenever six or fewer retarded children or adults reside in any type of residence in the community, they are to be considered a family and all local zoning requirements are waived. This law was approved May 13, 1977.

South Carolina

Under Act 449 of 1978 (April 4, 1978), homes approved or licensed by a state agency or department providing twenty-four hour care to no more than nine mentally handicapped persons shall not be excluded by local zoning ordinances from residential areas. These homes are construed to comprise a natural family.

No new license can be granted by the department if it would contribute substantially to an excessive concentration of facilities within the municipality or county. In determining whether to issue a license, the department must consider the population, size, land use plan, availability of services, and number and size of existing facilities in the jurisdiction.

The zoning law (Act 653 of 1976) was again amended by legislation effective June 13, 1983. The amendment requires the appropriate state agency or department, or the private entity operating the home under contract, to give prior notice to the local governing body administering the zoning laws of the exact site of the proposed home and the individual representing the agency, department, or private entity for site selection purposes.

If the local governing body objects to the selected site, it must, within 15 days of receiving notice, notify the site selection representative and appoint a representative to assist in selecting a comparable alternate site and/or structure.

The two representatives select a third mutually agreeable person. The three have 45 days to make a finding final site selection by majority vote. If no selection has been made within the time limit, the entity establishing the home shall select the site without further proceedings. No variance or special exception is required. Furthermore, no one may intervene to prevent the establishment of such a community residence without reasonable justification.

Prospective residents of the homes must be screened by the licensing agency to insure that placement is appropriate, and the licensing agency must conduct reviews of the homes at least every six months to promote the rehabilitative purposes of the homes and their continued compatibility with their neighborhoods.

Tennessee

Senate Bill 894 (and its companion House Bill 777), which became law in April, 1978, expressly declares it the legislative purpose to remove any zoning obstacles that prevent mentally retarded or physically handicapped persons from living in normal residential surroundings.

A single-family residence includes any home in which eight or fewer unrelated mentally retarded or physically handicapped persons reside, and • may include two additional persons acting as houseparents or guardians who need not be related to each other or to any of the physically handicapped or mentally retarded persons living in the home.

Texas

The Community Homes for Disabled Persons Location Act (Senate Bill 940), effective September 1, 1985, passed the legislature in June. An initiative of the Texas Association of Retarded Citizens, the legislation allows a "family home" in all residential zones or districts in the state.

"Family home" is defined as a community-based residential home operated by (1) the Texas Department of Mental Health and Mental Retardation; (2) a community center organized under Section 3.01, Texas Mental Health and Mental Retardation Act; (3) a nonprofit corporation; or (4) an entity certified by the Texas Department of Human Resources as a provider under the intermediate care facilities for the mentally retarded program.

To qualify as a family home, not more than six disabled persons, regardless of their legal relationship to one another, and two supervisory personnel may be residents. The home must provide food and shelter, personal guidance, care, habilitation services, and supervision. It must also meet all applicable licensing requirements. A home may not be established within one-half mile of a previously existing one. Only one motor vehicle per bedroom for the use of residents can be kept on the premises or on the adjacent public right-of-way, unless otherwise provided by city ordinance.

"Disabled person" is defined to include physical or mental impairment, or both, that substantially limits one or more major life activities (self-care, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, or working).

"Physical or mental impairment" includes orthopedic, visual, speech, or hearing impairments; Alzheimer's disease; pre-senile dementia; cerebral palsy; epilepsy; muscular dystrophy; multiple sclerosis; cancer; heart disease; diabetes; mental retardation; autism; or emotional illness.

Any restriction, reservation, exception, or other instrument that relates to the transfer, sale, lease, or use of property cannot prohibit the use of the property as a family home.

For a discussion of the U.S. Supreme Court decision in City of Cleburne, Texas v. Cleburne Living Center, Inc. (July 1, 1985), see p. 36.

Utah

Under a law passed by the legislature in March 1981, a residential facility for handicapped persons is permitted in any municipal or county zoning district, subject to a conditional review process, except a district zoned exclusively for "single - family dwelling use." This term means that occupancy by more than one family is prohibited.

The facility must conform to all applicable health, safety, and building codes and be capable of use without structural alteration that changes the residential character of the structure. The use permitted is nontransferable and terminates if the structure is devoted to another use, or if it fails to comply with relevant health, safety, and building codes.

The governing body of each municipality and county, under locally adopted criteria, is required to adopt zoning ordinances that allow, through conditional use permits, residential facilities for handicapped persons within districts zoned exclusively for single-family dwelling use. The ordinances may establish a 1-mile dispersal limit.

Persons being treated for alcoholism, illness, or drug abuse are ineligible for placement in a residential facility for handicapped persons. Placement is voluntary and shall not be part of, or in lieu of, confinement, rehabilitation, or treatment in a custodial or correctional type institution.

"Handicapped person" is given the functional definition of the federal developmental disabilities law (P.L. 95-602).

A "residential facility for handicapped persons" is defined as a single-family dwelling structure that is occupied on a 24-hour daily basis by 8 or fewer handicapped persons in a family-type arrangement under the supervision of houseparents or a manager.

Vermont

By virtue of a new law (24 V.S.A. 4409(d)), effective March 24, 1978, it is public policy in Vermont that developmentally disabled and physically handicapped persons shall not be excluded by municipal zoning ordinances from the benefits of normal residential surroundings. Additionally, it is state policy to avoid excessive concentration of group residences for developmentally disabled or physically handicapped persons within a municipality, or any part of it.

A state licensed or registered community care or group home serving not more than six developmentally disabled or physically handicapped person is a permitted single-family residential use of property subject to the qualification that it cannot locate within 1,000 feet of another such home.

Virginia

The Virginia statute (s.15.1-486.2, Code) declares it to be state policy that the mentally retarded and other developmentally disabled persons should not be excluded by local zoning ordinances from the benefits of normal residential surroundings.

It is also state policy to encourage and promote dispersion of residences for these persons to achieve optimal assimilation and mainstreaming. To this end, the number of group homes and their location must be proportional to the population and population density within the state.

The statute states that local zoning regulations shall provide for family care, foster, or group homes serving the mentally retarded or other 'developmentally disabled persons, not related by blood or marriage, in appropriate residential zoning districts. Group homes for eight or fewer persons are permitted in all residential neighborhoods.

Conditions imposed to insure compatibility with other permitted uses may not be more restrictive than those on other dwellings in the same zone, unless the conditions are necessary to protect the health and safety of the residents.

West Virginia

Under 1985 amendments, group residential facilities are a permitted use in all zones or districts (Chapter 8, Article 24, Section 50-b, and Chapter 27, Article 17, Section 2, Code 1931, as amended April 13, 1985, effective 90 days after passage). Previously, a group residential facility for eight or fewer persons with developmental disabilities, and not more than three supervisors, could locate in all but single-family or duplex family zones.

A conditional or special use prohibition is qualified. There are two exceptions:

1. If the home is to be located in a single-family zone and is to be occupied by more than six persons with developmental disabilities, and not more than three supervisors, or by persons with behavioral disabilities.
2. If the residents are persons with mental illness, a density limit of one per block face in a municipality, or a 1200-foot dispersal limit (measured front door to front door) in an area outside a municipality may be applied.

Before applying to the Department of Health or Department of Human Services for a license, the owner or operator of a group residential facility must first submit an application for the required zoning or occupancy permit to the appropriate zoning agency.

Upon receiving the license application, the Department must give written notice to the appropriate local governmental unit, which has 30 days to file objections or request a hearing. Upon receiving objections or a hearing request, the Department must conduct a hearing. The State Board is responsible for promulgating regulations governing the conduct of hearings.

Other changes allow a resident of a contiguous area of a single-family or duplex zone to file a complaint with the Department of Health or Department of Human Services, as appropriate. The Department must investigate if the complaint states specific conduct on the part of an individual, or other relevant facts, that adversely affect public health and safety.

If the Department determines that the alleged facts may have a substantial basis, it must reconsider the placement and inform the complainant in writing of the results, explaining the reason for the decision.

"Developmental disability" is functionally defined, as in the federal developmental disabilities law (P.L. 95-602).

Chapter 8, Article 24-50b, and Chapter 27, Article 17, Code 1931, as amended, declares void as against public policy any restrictions, conditions, exceptions, reservations, or covenants in any subdivision plan, deed, or other instrument relating to the transfer, sale, lease, or use of property that would prohibit its use as a group residential facility.

Wisconsin

Wisconsin's law (Chapter 205, Laws of 1977, effective March 28, 1978) applies to all community living arrangements, defined as a facility licensed, operated, or permitted by the Department of Health and Social Services and classified as a child welfare agency, group foster home for five to eight children, or community-based residential facility. Day care centers, nursing homes, general and special hospitals, and prisons and jails are not covered.

The law sets both dispersal and density limits. However, the agents of a facility may apply for an exception to either requirement, which may be granted at the discretion of the municipality. The dispersal requirement is 2,500 feet. Two facilities may be adjacent if the municipality authorizes it and if both comprise essential elements of the same program.

Community living arrangements are permitted in any city, town, or village up to a total capacity of 25 persons, or one percent of the municipality's population, whichever is greater. In cities of the 1st through 4th classes, the density limit applies by aldermanic district. Existing facilities are "grandfathered," but count in the total.

Community living arrangement with a capacity of from one to eight persons may locate in any residential zone. Arrangements with a capacity of from nine to fifteen persons are permitted in all but single- or two-family zones. A facility of this capacity may apply for special permission to locate in a single- or two-family zone; municipalities must make procedures available to enable facilities to request permission. Living arrangements with a capacity of sixteen or more persons may apply for special permission to locate in residential zones.

A licensed foster family for from one to four children, which is the primary domicile of a foster parent, is a permitted use in all residential zones and is not subject to the dispersal or density limit. Foster homes operated by corporations, child welfare agencies, churches, associations, or public agencies, however, are subject to these limits.

Community living arrangements are subject to the same building and housing ordinances, codes, and regulations of the municipality or county as similar residences in the area.

A municipality may make an annual determination of the effect of the living arrangement on the health, safety, or welfare of the residents of the community. If it finds that a threat is posed, it may order the operation to close unless special zoning permission is obtained. The order is subject to judicial review. At the determination, the community living arrangement may be represented by counsel, present evidence, examine and cross-examine witnesses. It is entitled to thirty days' notice of the hearing.

A licensee must attempt to resolve complaints informally. If efforts fail, the licensee must inform the party of the formal complaint procedure. Formal complaints are filed with the county public welfare department unless the county designates the Department of Health and Social Services to receive them.

Wisconsin successfully defeated four attempts to erode its law. Amendments would have exempted community living arrangements housing more than two offenders, or persons on probation or work release from prison, or facilities operated directly or indirectly by the Division of Corrections.

A caveat: an abortive effort to circumvent the law was made by using contracting to control the location of facilities. A community board attempted to require applicants to obtain the approval of the county supervisor before it would issue the purchase of service contract. This was subsequently modified to limit the county supervisor before it would issue the purchase of service contract. This was subsequently modified to limit the county supervisor's power to prior review and comment.

Comparison and Contrast**

The statutes of Arizona, California, Colorado, Delaware, Maryland, Maine, Michigan, Tennessee, and Wisconsin all provide that state-licensed group home for a limited number of handicapped persons are to be considered a residential use of property for zoning purposes, and a permitted use in all residential zones, including single-family.

New Mexico's law differs in that the above provision is permissive rather than mandatory. Group homes "may be considered in residential use of property for zoning purposes and may be (a) permitted use in all districts in which residential uses are permitted generally..."

Arizona, Minnesota, and Ohio differentiate between two categories of group homes according to the number of residents. The smaller are a permitted single-family residence; the larger are a multi-family use, to be located in areas designated for multi-family dwellings, such as apartments.

Wisconsin also differentiates among categories of community living arrangements, according to capacity. Those with a capacity of eight or fewer may locate in any residential zone; nine to fifteen, in all but single- or two-family zones, but may apply for special permission to locate in these zones; sixteen or more, may apply for special permission to locate in residential zones.

The Virginia law requires local zoning regulations to provide for group homes in appropriate residential zoning districts, but does not define the work appropriate. Arizona, Rhode Island, and South Carolina's statutes designate group home residents a family. New Jersey's law prohibits discrimination between children who are members of single families by virtue of blood, marriage, or adoption and nonrelated-children placed in single-family dwellings known as group homes.

Disability Categories

Eight state statutes expressly refer to developmentally disabled persons. The Colorado law defines developmentally disabled persons as those with cerebral palsy, multiple sclerosis, mental retardation, autism, and epilepsy. Under New Mexico law, a developmental disability is one

** For Chart comparing and contrasting provisions of state zoning laws, see Appendix p. 4.

attributable to mental retardation, cerebral palsy, autism, or neurological dysfunction that requires treatment or habilitation similar to mental retardation. Delaware adds physical impairment to New Mexico's definition. Arizona, Louisiana, Ohio, Utah, and West Virginia adopt the definition in the federal developmental disabilities law.

Maine's law covers persons with mental handicaps or developmental disabilities, as does the Virginia statute, which refers to "mentally retarded and other developmentally disabled persons" without defining "developmentally disability."

The Maryland law applies to mentally retarded persons only. West Virginia's law refers to persons with autism, cerebral palsy, and mental retardation.

Vermont's statute applies to "developmentally disabled and physically handicapped persons" without defining "developmentally disabled."

Conditional Use Permits

Nine of the state zoning laws (California, Colorado, Montana, Minnesota, New Jersey, Utah, Virginia, and West Virginia) allow some local control over placement of group homes by permitting local-governments to require operators to obtain conditional use permits.

Montana's law does not restrict a municipality or county from requiring a conditional use permit to maintain a group home. Colorado allows regulation of group homes by local zoning boards as long as the regulations did not exclude group homes from any residential district.

Because conditional use permits may be a means of avoiding the intent of state law to allow group homes in residential neighborhoods, Arizona and Michigan allow only conditional use permits that do not differ from those required of dwellings of similar density in the same zone.

California, Minnesota, and Virginia allow more restrictive conditions on group homes by ordinance and regulation only where necessary to protect the health and safety of the residents.

In Utah, a residential facility for handicapped persons is permitted in any municipal or county zoning district, subject to the conditional review process, except a district zoned exclusively for single-family dwelling use. The governing body of each municipality or county, under locally adopted criteria, is required to adopt zoning ordinances that allow, through conditional use permits, residential for handicapped persons in districts zoned exclusively for single-family dwelling use.

West Virginia prohibits conditional use permits in all but single-family and duplex-family residence zones.

In Louisiana, some local control is allowed by requiring site approval by the local planning commission and/or the local governing authority.

Dispersal Requirements

Eighteen (or 60 percent) of the 28 state zoning laws and that of the District of Columbia contain dispersal requirements. Minnesota's is the smallest: 300 feet between facilities unless a conditional use permit is granted. Colorado requires 750 feet between facilities; Louisiana and Vermont, 1,000 feet; Arizona, a 1,200 foot radius, and North Carolina a one-half mile radius.

Maine and New Jersey imposes a 1,500 foot radius limit. In Michigan the 1,500 foot limit prevails unless permitted by local ordinance, except in cities over 1 million population where the limit is 3,000 feet. Wisconsin requires 1,500 feet between facilities unless permitted by local exception.

The District of Columbia sets a limit of 1,000 feet or 500 feet, subject to special exceptions, differentiating on the basis of type of zone and number of occupants of the facility.

Nebraska sets a limit of 1,200 feet unless the municipal governing body grants a conditional or special use permit. A metropolitan class city may establish by ordinance a one-half mile limit.

Delaware imposes a 5,000 foot radius requirement.

West Virginia's limit is one per block in a municipality, and 1,200 feet, from front door to front door, in areas outside a municipality.

Utah allows municipalities or counties, by ordinance, to establish a 1-mile dispersal limit.

Density Limits

In New Jersey density is restricted to 50 persons or .5 percent of the municipality's total population.

Wisconsin's limit is 25 persons, or 1 percent of the population, whichever is greater.

Nebraska controls density as follows:

<u>Population</u>	<u>Number of Homes</u>
fewer than 1,000	1
1,001 - 9,999	1 for every 2,000
10,000 - 49,999	1 for every 3,000
50,000 - 249,999	1 for every 20,000 population

The municipal governing body may issue a variance to allow additional group homes.

Restrictive Covenants

Indiana (code Section 16-10-21) and Carolina (Section 168-23, General Statutes) expressly declare restrictive covenants void as against public policy.

The "Site Selection of Community Residential Facilities" law (New York Mental Hygiene Law, Section 41.34, Laws of 1978, Chapter 468) established the right of mentally disabled citizens to form family units and to live in single-family residence in residential areas.

Increasingly, restrictive covenants have been used in attempts to circumvent the Site Selection Law. The New York Supreme Court, Appellate Division, 2nd Department, in Crane Neck Association, Inc. v. N.Y.C./Long Island County Services Group (March 7, 1983) held that restrictive covenants used against community residences for the disabled are invalid as against public policy, including the Site Selection Law.

The case arose out of the establishment of a community residence for eight mentally disabled adults in Crane Neck, Long Island, by the Office of Mental Retardation and Developmental Disabilities. The land that was going to be leased had a restrictive covenant in the deed stating that the premises or any building could not be used for other than single-family dwellings and outbuildings. The issue before the court was whether the community residence was a single-family.

In Tufell v. Kaen, the Appellate Division, 1st Department (June 4, 1979, aff'd 77 AD 2d 519) ruled that group residences for the mentally disabled, although deemed statutory single families for purposes of the Site Selection Law, were not single families for purposes of restrictive covenants. It is expected that these contrary holdings will be submitted to the New York Court of appeals for decision on the enforceability of restrictive covenants.

The New York General Obligations Law (Section 5-331 forbids the use of restrictive covenants to discriminate in the occupancy or ownership of property on the basis of race, creed, color, national origin, or ancestry. The New York State Commission on Quality of Care for the Mentally Disabled has advocated an amendment that would add language including community residential facilities for the mentally disabled, as defined in the Site Selection Law, to the prohibited discriminations. This would obviate a decision by the New York Court of Appeals.

Words to the Wise

The following blueprint for legislative drafters is recommended by Chandler and Ross.

1. A brief declaration of the need for normalizing the lives of developmentally disabled persons.
2. A description of how integration in residential zones meets this need.
3. A statement emphasizing that uniform integration can occur only through state legislation and that, therefore, the matter is one of statewide concern. (The relevant constitutional provisions and preemption cases of the appropriate jurisdiction should be consulted for suggested language.)

4. A provision making the statutes expressly applicable to charter cities. (The home rule provisions of the state constitution should be consulted.)
5. A requirement that the foster home be a permitted use in all residential zones, including, but not limited to, single-family zones.
6. A grant of authority to the local entity to impose reasonable conditions on use.
7. The type of community residential facility referred to in the statute, including the number of residents served and the range of handicaps which they possess, should be based on the licensing classification of small group homes in the particular jurisdiction.

I would add to this list a caveat that negates overconcentration.

Constitutional Challenges

The Ohio State Supreme Court dealt a death blow to Ohio's 1977 zoning law in *Garcia v. Siffrin Residential Association*, July 30, 1980. The zoning law prohibited political subdivisions from developing zoning ordinances that would discriminate against family homes for eight or fewer persons in single-family residential areas or group homes for eight or fewer persons in single-family residential areas or group homes for nine to sixteen persons in multiple-family residential districts.

The court ruled that the proposed facility could not be included in the definition of "family" in the Canton zoning code, since it was not a single housekeeping unit for the sharing of rooming, dining, and other facilities, but was primarily for the purpose of training and educational life skills.

Moreover, the zoning ordinance was a reasonable exercise of police power granted to municipalities by the Ohio constitution and could not be preempted by state law.

In a related decision, *Brownfield v. State of Ohio*, the Ohio Supreme Court reversed a court decision that a privately operated, state-owned facility is automatically exempt from municipal zoning restrictions.

The state had purchased a single-family residence to use as a halfway house for patients discharged from a state psychiatric facility. The house was to serve as a home for five residents who would do their own shopping, cooking, and household chores. Daily supervision would be provided by a nonprofit agency, but the state would be responsible for furnishing and maintaining the home.

Neither the state nor the nonprofit agency had sought zoning approval for the proposed halfway house, located in a single-family residential district. Unless a direct statutory grant of immunity exists, the court held, the condemning or landowning authority must make a reasonable attempt to comply with the zoning restrictions of the political subdivision.

In a third case (Carroll v. Washington Township Zoning Commission), the court held that a home in an area zoned for agricultural and single-family residential use would violate township zoning ordinances if it continued to be used as a foster home for five or six adolescents.

Plaintiffs, foster parents, renovated a thirteen-room house to accommodate several foster children in addition to their own. During the first year plaintiffs averaged seven children living with them at a time for periods ranging from six months to a year. The Ohio Youth Commission arranged a separate contract for each child.

Ruling that plaintiffs' home was not a "one family residential dwelling unit," the court declared that the children were transients rather than an integrated family. Other factors influencing the decision were the separate contracts and the rules and regulations of the Ohio Youth Commission and those of the plaintiffs.

A dissenting opinion pointed out that the factors relied upon by the majority could serve to bar any foster family, even with only one foster child, from an R-1 district. Furthermore, any foster care program is temporary, since it is a means of caring for children until they can return to their maternal parents, or an adoptive home can be found.

Louisiana

The 1983 amendment to the Mental Retardation laws (LSA 28: 381(5)), was challenged in a suit by four residents of a Baton Rouge subdivision to enjoin Special Children's Foundation, Inc. and Special Children's Village, Inc., from operating a group home for the mentally retarded at a residence purchased by the foundation. The plaintiffs alleged violation of building restrictions placed on the property in 1962. The restrictions limited buildings on the lots to one detached single-family dwelling not exceeding two and one-half stories in height and a private garage or carport for not less than two nor more than three cars.

Louisiana's Mental Retardation Law, Chapter 4 of Title 28 (LSA R.S. 28: 380-444), was amended and re-enacted by Acts 1982, No. 530, effective August 1, 1983). As amended, LSA 28: 381(5) provided that "community homes for six or fewer mentally retarded persons, with no more than two live-in staff, shall be considered single-family units having common interests, goals, and problems."

The Children's Foundation contended that Chapter 4 of Title 28 is a valid exercise of the state's police power and thus supersedes the building restriction. On the other hand, plaintiffs argued that to apply the statutory definition of community home to the building restriction impaired the obligation of their contract in violation of the state constitution.

Reversing the lower court, the appellate court held that the legislative definition of community homes is reasonably related to the protection and promotion of a public good and thus within the police power of the state. The court specifically declared that "the public at large will be greatly benefitted by the integration of handicapped individuals into the mainstream of society."

In *Clark v. Manuel*, 463 So. 2d 1276 (La. 1985), the Louisiana Supreme Court, reversing a lower court decision, ruled that R.L.28: 478C, insofar as it denies the Lafayette Association of Retarded Citizens the right to use a residence for a community home for retarded individuals without the prior approval of the local governing authority of the Town of Scott, Louisiana, violates the equal protection clauses of the United States and Louisiana Constitutions.

The Clarkes, who owned and lived in a house in the subdivision, sought an injunction to prevent LARC from operating the community home. The Louisiana Supreme Court found that a restrictive covenant attached to the lot, which required that it be used for residential purposes only, was not violated by LARC's proposed use.

That the home's occupants are given training to live in a community rather than an institutional environment did not convert the use to a commercial or nonresidential one, the court ruled. Although the covenant prevents erection of any structure other than a single-family dwelling, there are no limits on the number of occupants nor any requirement that the occupants be related.

The provisions of R.L. 28:478(C), a subsection of Chapter 5, "Group Homes for Handicapped Persons Act" of Title 28 of the Revised Statutes, requires a local sponsor to notify the local governing authority of an intent to file an application with the Department of Health and Human Resources to open a community home and thereafter to secure site approval from the local governing authority.

Applying a heightened scrutiny or "means" test, and citing the opinion of the United States Court of Appeals, Fifth Circuit, in the *Cleburne* case, the Louisiana Supreme Court ruled that there was no substantial relationship between this restriction on the establishment of group homes for the mentally retarded and any important governmental objective. There is no legitimate state interest in requiring a group home to obtain local approval of the site while not requiring other owners or lessors to do likewise. The definition of "community home" as six or fewer retarded persons and two live-in counselors together with a 1,000-foot radius limit insures that undue population concentration is not created.

Connecticut

A Norwich, Connecticut citizens group challenged the 1979 state zoning law requiring community-based residences for six or fewer retarded persons to be treated as single-family homes for zoning purposes. The citizens group seeks to halt efforts of the State Department of Mental Retardation to establish a group home in a large Norwich residence, alleging that the state zoning law is an invalid exercise of legislative power with respect to the home-rule doctrine.

Other Legal Challenges

Alabama

Two court contests have halted construction of group homes for persons with developmental disabilities in the communities of Huntsville and Hartselle.

In *Board of Adjustment, City of Huntsville vs. Civitan Care, Inc. and Huntsville Group Homes, Inc.*, the city contested two co-located group homes, one supported by developmental disabilities funds. Huntsville contended that the group homes were not single-family dwellings and were transitory in nature.

Civitan Care, Inc., leased two buildings to a nonprofit corporation established to provide handicapped and mentally retarded persons with housing and other services. The lessees proposed to establish for developmentally disabled citizens two residential programs designed to provide a family-like occupancy. Residents would receive training and participate in day programs to acquire community living skills. Each duplex, one for women and one for men, would house six developmentally disabled adults plus resident managers. Funding would be provided by the state and, when possible, by the residents themselves. Meals would be furnished by staff with help from the residents.

The local zoning board denied a request that the two homes be considered "family-only occupancy" and also rejected an alternative request for a variance. The lower court upheld the zoning board.

The Alabama Civil Court of Appeals affirmed, citing the ruling in City of Guntersville v. Shull, 335 So. 2d 361 (Ala. 1978) as controlling. In the Shull case, a comparable living arrangement in a town with a similar zoning ordinance was held to be a rooming or boarding house and thus not a permissible use within a family-only zone. The applicable ordinance defined a boarding home as a place where "for compensation meals are provided for three or more persons." The fact that compensation for residents would be received was a factor in deciding that the group home residents would not constitute a family (*Civitan Care, Inc. v. Board of Adjustment of the City of Huntsville*, 437 So. 2d 540 (Ala. Civ. App. 1983)).

Volunteers of America, a nonprofit organization, was ready to proceed with construction of a \$225,000 HUD Section 202-funded group home on a vacant lot in Hartselle, a site once occupied by a church. The group home, one of five to be built across the state, was to be part of a program operated and managed by the Volunteers of America through contracts with the Department of Mental Health and Medicaid. The plan was for a home that would also serve as a training center for nine developmentally disabled adults, who would receive 24-hour daily supervision by professional staff.

Unable to decide whether the home met P-3 zoning ordinances, the City Planning Commission referred the matter to the Zoning and Adjustment Board, which is responsible for ruling on zoning questions and considering variances. At issue was whether the center could be defined as an "apartment complex."

The city granted a variance to build on the site, but HUD refused to approve the site because of railroad noise pollution. The home was constructed at another site and is operating as a Medicaid-approved 10-bed residence.

Texas _____'

In July 1980 Jan Hannah purchased a house in Cleburne, Texas, with the intent of leasing it to Cleburne Living Centers, Inc., a private nonprofit Texas corporation organized to establish and operate group homes for mentally retarded persons. The corporation planned to open a group home for thirteen mildly to moderately retarded adults of both sexes. The group home was to be certified as an ICF/MR Level 1. The Living Center operated three group homes in neighboring communities.

Hannah applied for a special use permit, required under a city zoning ordinance in areas designated R-3, high-density, multi-use areas. The ordinance allowed boarding and lodging houses, fraternities and sororities, hospitals, schools, nursing homes, and private clubs in the area. A special use permit was required of "hospitals for the insane or feebleminded, alcoholics or drug addicts, or penal or correctional institution."

Following a public hearing, the city council denied the permit, citing the following reasons:

1. Attitude of a majority of the property owners located within 200 feet of the group home.
2. Location of a junior high school across the street.
3. Concern for fears of elderly residents of the neighborhood.
4. Concern over the legal responsibility of the Living Center for actions of the residents.
5. Location on a 500-year flood plain.
6. In general, presentations at the hearing were unfavorable.

The Living Center brought suit in the United States District Court for the Northern District of Texas, claiming that the ordinance discriminated against handicapped persons in violation of the federal Revenue Sharing Act and the equal protection and due process clauses of the Fourteenth Amendment to the United States Constitution.

Ruling against the Living Center, the court found the ordinance "rationally related to legitimate purposes and interests of the city" and "not arbitrary, capricious or irrational."

In arriving at this conclusion, the court rejected the -plaintiff's contention that mentally retarded persons constitute a "suspect" or "quasi-suspect" class and, therefore, deserve a higher level of judicial scrutiny in cases of alleged discrimination.

The United States Circuit Court of Appeals for the Fifth Circuit reversed the District Court decision, holding that the ordinance violated the equal protection clause. The court ruled that mentally retarded persons are a "quasi-suspect" class, receiving heightened or intermediate judicial scrutiny of classifications affecting them. The classification must bear a "fair and substantial" relation to "important government objectives."

Equal Protection Guarantee: Three Tests

The equal protection guarantee includes all governmental actions that classify individuals for different benefits or burdens under the law. The classifications cannot be based on-impermissible criteria or arbitrarily used to burden a particular group.

Whether a classification meets the equal protection guarantee depends on the purpose of the legislation and the degree of relationship between the end sought and the group affected. This depends on what standard of review is applied.

1. Rational basis. (Is the legislation creating the classification rationally related to a legitimate state interest?)

The U.S. Supreme Court holds that economic classifications and those dealing with general social welfare regulation need only be rationally related to a legitimate governmental objective.

2. "Means" or "heightened scrutiny." (Is the classification substantially related to an important governmental objective?)
3. Strict scrutiny. (Is the classification necessary to promote a compelling state interest?)

The U.S. Supreme Court has held that only classifications infringing upon certain fundamental constitutional rights or classifications that disadvantage "discrete and insular minorities" will be subjected to strict scrutiny.

Legislation of this type will be upheld only if necessary to promote an extremely or compelling end of government.

In the traditional equal protection analysis, the initial determination is whether a given act disadvantages a suspect class or infringes on a fundamental right. If it does not, the act need only rationally further some legitimate, articulated state purpose or goal. This level of scrutiny • rarely renders an act unconstitutional.

But with a finding that a suspect class or fundamental right is involved, an act will frequently fall short of promoting a compelling state interest (the strict scrutiny of review level).

Courts have been reluctant to define as suspect any but the most arbitrary classifications. In fact, only classifications based on race have been uniformly treated as suspect.

Other classifications, such as those based on gender and illegitimacy, have been categorized as quasi-suspect and subjected to a "means scrutiny" test, a middle tier between strict scrutiny and rational basis. Under this test, a classification must be reasonable, not arbitrary, and must rest on some ground of difference bearing a fair and substantial relation to the object of the legislation.

Issue of First Impression

In applying the middle tier level of scrutiny to statutes affecting the mentally retarded in the Cleburne case, the United States Court of Appeals, Fifth Circuit, noted that although some district courts had discussed the issue whether the class of mentally retarded persons is suspect, no appellate opinion had addressed the issue. In deciding this issue of first impression, the court examined the indicia of suspect classes previously identified by the U.S. Supreme Court.

The high court considered whether the class was "saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." If membership in a minority group is immutable, special protection is more likely afforded the class.

Fifth Circuit Reasoning

The condition of the mentally retarded was immutable. Until the 1970's admittance into the public schools was universally denied. In the first half of the twentieth century, an organization sought to eradicate the retarded through euthanasia and compulsory sterilization. "As part of this pattern of mistreatment, mentally retarded persons have been segregated in remote, stigmatizing institutions," the court stated, "which has perpetrated the historical misunderstanding of such individuals and led to widespread fears and uncertainty." Disqualified from voting in most states, this group could truly be said to lack political power.

This combination of factors - historical prejudice, political powerlessness, and immutability - called for heightened scrutiny of any legislation discriminating against mentally retarded persons.

However, the classification might well be relevant in some instances, such as the types of school programs to which a child is assigned or the types of employment for which an adult is qualified. The court therefore declined to apply the strict standard of review, but concluded that mentally retarded persons are a quasi-suspect class and that intermediate scrutiny is required for laws discriminating against them.

Furthermore, the court found heightened scrutiny appropriate while a statute makes it more difficult for this class to enjoy an important right. In the absence of the individual's own family or a suitable foster home placement, group homes are the principal alternative for community living for the mentally retarded. Their availability is essential to the development of normal living patterns.

Under the heightened scrutiny equal protection test, the ordinance was facially invalid because it did not substantially further an important governmental purpose, and was also invalid as applied.

U.S. Supreme Court Decision

The majority opinion found that mentally retarded persons, who have a reduced ability to cope with and function in the everyday world, are different from other persons, and the state's interest in dealing with and providing for them is a legitimate one. "The distinctive legislative response, both national and state, to the plight of those who are mentally retarded demonstrates not only that they have unique problems, but also that lawmakers have been addressing their difficulties in a manner that belies a continuing antipathy or prejudice and a corresponding need for more intrusive oversight by the judiciary than is afforded under the normal equal protection standard."

Moreover, the court went on to say, the legislative response, which could not have occurred and survived without public support, negates a claim that the mentally retarded are politically powerless in the sense that they have no ability to attract the attention of lawmakers.

Holding that legislation affecting the mentally retarded need only be rationally related to a legitimate governmental purpose, the court stated that this standard "affords government the latitude necessary both to pursue policies designed to assist the retarded" and to freely and efficiently engage in activities that burden the retarded in what is essentially an incidental manner.

In this case, irrational prejudice led to the denial of the permit, as there was no rational basis for believing that the home posed a special threat to the city's interests. The city's denial under its zoning ordinance of a permit for a group home to house 13 mentally retarded adults of both sexes in a multi-use, high-density zone was invalid under the equal protection clause of the Fourteenth Amendment to the U.S. Constitution.

The majority opinion was written by Justice Byron White.

Concurring Opinion: One, Not Three, Standards

In a concurring opinion, Justice Stevens, joined by Chief Justice Warren Burger, questioned any need for different levels of equal protection scrutiny.

Justice Stevens is of the opinion that the tiered analysis of equal protection does not describe a logical method of deciding cases, but a method the Supreme Court has used to explain decisions that apply a single standard in a reasonably consistent manner. Cases involving classifications based on alienage, illegal residency, illegitimacy, gender, age, or mental retardation do not fit into sharply defined classifications.

The rational basis test, properly understood, adequately explains why a law that deprives a person of the right to vote because of skin pigmentation violates the equal protection clause. It would be irrational to limit the franchise on the basis of height or weight and equally so to limit it on the basis of skin color. No special standard of scrutiny is needed.

In equal protection cases, the basic questions are: (1) What class is harmed, and has it been subjected to a tradition of disfavor by our laws? (2) What public purpose is served by the law? (3) What is the characteristic of the disadvantaged class that justifies the disparate treatment? Generally, the answers reveal whether the statute has a rational basis. The answers result in virtually automatic invalidation of racial classifications and validation of most economic qualifications, but provide different results in cases involving alienage, gender, or illegitimacy. That is not because the court applies an intermediate standard of review, but because the characteristics of these groups sometimes are relevant and sometimes irrelevant to a valid public purpose.

Dissenting Opinion

Justice Marshall, joined by Justices Brennan and Blackman, concurred in the part of the judgment that declared the permit denial a violation of the equal protection clause, but dissented from the part regarding level of scrutiny, stating that classifications involving the mentally retarded should be subject to more than minimum rationality review.

When a zoning ordinance works to exclude the retarded from all residential districts in a community, two considerations require that the ordinance be justified as substantially furthering legitimate and important purposes.

1. The interest of the retarded in establishing group homes is substantial. The right to establish a home is one of the fundamental liberties embraced by the due process clause. As deinstitutionalization has progressed, group homes have become the primary means by which retarded adults can enter life in the community. Excluding group homes deprives the retarded of much of what makes for human freedom and fulfillment - the ability to form bonds and take part in the life of the community.

2. The mentally retarded have been subject to a lengthy and tragic history of grotesque segregation and discrimination.

During much of the nineteenth century, mental retardation was viewed as neither curable nor dangerous, and the retarded were largely left to their own devices. By the latter part of the century and during the first decades of the twentieth century, social views of the retarded underwent a radical transformation with the advent of social Darwinism and eugenics. The "feebleminded" were portrayed as a menace to society and civilization. A regime of state-mandated segregation and degradation emerged that "in its virulence and bigotry rivaled ... the worst excesses of Jim Crow." Massive custodial institutions were built to warehouse the retarded for life. The aim was to halt reproduction of the retarded and nearly extinguish their race. Marriages continue to be not only voidable but also a criminal offense in some states (Kentucky, Michigan, and Mississippi).

As of 1979, most states still disqualified "idiots" from voting, without regard to individual capacity and with discretion to exclude left in the hands of low-level election officials.

Rather than striking the ordinance down, the Court invalidated it only as applied to the Living Center. Invalidating on its face the ordinance's special treatment of the "feebleminded" would place the responsibility for more narrow tailoring and updating it on the city's legislative arm.

The dissenting opinion upheld the Fifth Circuit decision in its entirety. It dissented from the majority opinion in the way it reached its result and with the "as-applied" remedy.

Virginia

Home owners in two Chesterfield County communities sought to block construction of two homes for mentally retarded adults. Each home was designed for four adults and one full time counselor. Omega Corporation, a nonprofit agency, owned the two lots and planned to build the homes.

The home owners argued that their subdivision covenants restricted housing to single-family residences. The Omega Corporation, on the other hand, contended that the covenants dealt with the type of buildings to be constructed and whether they were used for residential purposes. Omega further argued that "family" should be interpreted broadly; otherwise three unrelated school teachers or a family with a live-in maid would not be allowed to live in the neighborhood.

A 7-1 decision of the Virginia Supreme Court affirmed the lower court's ruling for the home owners, declaring that group homes for mentally retarded adults cannot qualify as single-family housing if a counselor lives with the group. Though the court agreed that "family" should be interpreted broadly, it stated that the presence of counselors and their supervision of the occupants would convert what might otherwise have been a single-family use into a facility.

Property Value: Up or Down?

Establishment of a group home often encounters neighborhood resistance, the fear being that it will adversely affect property values and alter the character of the neighborhood. Numerous studies (Columbus, Ohio; Decatur, Illinois; Green Bay, Wisconsin; Lansing, Michigan; Philadelphia; San Francisco; Washington, D.C.; White Plains, New York, and New York State) allay this fear.

The studies were conducted in upper middle class, single-family, multiple family, low income housing, apartment complexes, and in white, black, aged, and mixed neighborhoods. In Lansing, Michigan, the average sales price after the group home was established was equal to or higher than for the control neighborhood. Of 365 Philadelphia property transactions tracked in a six-block radius of a number of facilities, 59 percent occurred before the facility opened and 41 percent after. There was no decline in property values; but there was some indication that property values increased less as distance from the facility increased, suggesting that a facility may be a positive factor in upgrading a neighborhood.

An Ohio study found that property values in neighborhoods with group homes had the same increase or decrease in market price as homes in similar neighborhoods; that close proximity to a group home did not significantly alter the market value of a property, nor did adjacent properties decline in value; and that group homes did not generate more neighboring property turnover than in other similar neighborhoods.

None of the variables altered the fact that the facilities contributed to the economic stability of the neighborhood. The facilities were quiet, well-maintained homes. There was no evidence of neighborhood saturation, incompatibility with neighboring properties, visible or annoying residents, or decline in neighborhood character.

Legal Challenge

A Greenwich Tax Review Board reduced the assessments from five to ten percent for nine houses near a group home for mentally ill adults. The Mental Health Law Project (Washington, D.C.), representing the Connecticut Association of Residential Facilities, joined the Attorney General in challenging the board (*Lieberman v. Greenwich Tax Review Board*, April 19, 1985). The suit - the first of its kind - charged that because the decision was based only on unwarranted fears and prejudices against persons with mental illness, it violated state and federal law and the state and federal constitutions.

Community Acceptance

The factors were identified in another Ohio study that indicated the degree of acceptance that may be anticipated when opening a group living arrangement in a residential area. These factors are:

1. Number of similar homes in a neighborhood

Group homes located close to other group homes given an appearance of saturation.

2. Transience of the neighborhood

Homes located in semi-transient neighborhoods are less likely to encounter opposition than those in more stable neighborhoods.

3. Amount of traffic

Homes located on streets, avenues, or boulevards with moderate traffic experience less opposition than those on lightly or heavily traveled streets.

A. Previous use of home

Homes previously occupied by a nuclear family are more likely to be opposed than those previously used in another manner, or homes constructed by the operator.

5. Age of neighbors

Younger neighbors are apt to exhibit a more positive attitude toward the group living arrangement and the people living there.

6. Number contributing to household income

Households with one economic provider are more apt to view the group home negatively than those with more than one provider.

7. Length of time in neighborhood

Those who have lived longest in a neighborhood are more apt to view the group home negatively.

8. Parking

Group homes with parking lots on the property are more likely to encounter opposition than those that use on-street parking.

9. Resident Gender

Group homes with all females or both males and females encounter less opposition than all-male homes.

10. Staffing

The more staff employed, the more positive the attitude of neighbors.

Hundreds attended a day long District of Columbia City Council oversight hearing in the fall of 1984 to determine how the city's three-year-old experiment with community-based facilities was working. Neighbors expressed strong support for group homes in their communities and recommended creating more of them.

Attitude change was evident on the part of Cleveland Park residents, who had vigorously opposed the opening of a home for retarded persons in their neighborhood three years earlier. They attended the hearing to voice support for and goodwill toward their group home neighbors.

Community Education

A Neighborhood Opinion survey conducted by the University of Dayton in neighborhoods with and without group homes found general agreement that mentally retarded persons have a right to live in the community and that a group home is preferable to an institution. Almost 85 percent were uncertain how well the home would be maintained, and 70 percent whether property values would be affected; over 80 percent were undecided about staff quality; and 75 percent did not know whether residents would have a negative effect on the neighborhood. More than 40 percent thought staff and residents should have more contact with people in the neighborhood, but more than 41 percent were undecided.

This survey underscores the need for greater community education. "A Kit for Community Acceptance of Group Homes," prepared by the Wisconsin Council on Developmental Disabilities, has proved very effective in fostering successful community living arrangements.

The New Jersey Developmental Disabilities Council and the New Jersey Division of Mental Retardation have initiated a statewide media campaign to increase public understanding and acceptance of group homes for persons with developmental disabilities. Laddin and Company, Inc., New York, a private advertising agency, will donate its time and talent to develop the campaign.

The campaign is the result of a White House initiative to encourage cooperation between the public and private sectors. New Jersey is one of the first states to pioneer the use of a model based on the arrangement existing between federal agencies and the National Advertising Council since World War II. Production costs for the New Jersey group home campaign will be paid by the New Jersey Development Disabilities Council and the Division of Mental Retardation.

Wind Up

The richness of America's diversity is one of its strengths. Humankind's goals will be achieved through divergent means. Courts have paved the way for the Solons. The torch is returned now to the advocates who must select from this experience the appropriate actions to translate public policy into the reality of a finer society.

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APPENDIX

STATE ZONING LEGISLATION

STATE	LAM (33)
Arizona	Title 36, Chap. 5.2, Revised Statutes
California	Welfare and Institution Code 5115-5116
Colorado	Revised Statutes, 30-28-115, 27-10.5-133
Connecticut	Chapter 124, Sec. 8-3e, Conn. Code
Delaware	Chapter 390, Laws of 1979, amending Title 9, Chaps. 26, 49, 68 and Title 2, Chap. 3, Delaware Code
District of Columbia	Zoning Conn. Regs., 7/9/81, pursuant to D.C. Code Sec. 5-413 et seq.
Florida	Section 163, 3177(6) (f), Fla. Stats*
Hawaii	Chapter 46, Hawaii Rev. Stat., 1992 Suppl.
Idaho	Chapter 65, Title 67, Sections 6530-6532
Indiana	Section 16-10-2.1, Ind. Code
Iowa	Chapters 338A.25 and 414.22, Code of 1983
Louisiana	Chapter 4, Title 28, Sections 381, 473-476, Rev. Stats*
Maine	Chapter 640, Laws of 1962
Maryland	Art. 50A, Ann. Code, 1977 Replacement Vol. and 197 7 Suppl.
Michigan	Public Act Nos. 394-396 Public Acts of 1976 (January 3, 1977)
Minnesota	Chapter 60 11.2702
Missouri	Section 39.020, Missouri Revised Statutes, 1978
Montana	Revised Code 11-2702
Nebraska	Section 18-1744-47, Revised Statutes, 1960 Suppl.
Nevada	Chapter 154, Laws of 1981

STATE ZONING LEGISLATION — Continued

STATE	LAM (33)
New Jersey	Chapter 139, 40:55D, Laws of 1978
New Mexico	House Bill 473 (April 7, 1977)
New York	Chap. 468. Sec. 41.34, Laws of 1978
North Carolina	Chapter 168 of General Statutes, as amended by Senate Bill 439, 1961 Session (June 12, 1981)
Ohio	Senate Bill 71 (August 1, 1977)
Rhode Island	Senate Bill 918 (May 13, 1977)
South Carolina	Section 1A of Act 653 of 1976, as added by Act 449 of 1978 (April 4, 1978) as amended June 13, 1983
Tennessee	Senate Bill 894 and House Rill 777 (April 1978)
Texas	Senate Bill 940 (June 1985)
Utah	Sections 10-9-2.5 and 17-27-11.3, Utah Code Ann. 1953
Vermont	H. 696 (March 23, 1978) 24 V.S.A. 4409(d)
Virginia	Chapter 648, Laws of 1977; Code 15.1-486.2
West Virginia	Chapter a, Article 24, Section 24-50b and Chapter 37, Article 17, Section 2 Code, 1931 as amended
Wisconsin	Chapter 205, Laws of 1977 (March 23, 1977)

STATE ZONING LEGISLATION

STATE	NONE
Alabama	
Alaska	Not presently an issue
Arkansas	
Georgia	Home rule; local issue
Illinois	Home rule
Kansas	
Kentucky	Home rule
Massachusetts	
Mississippi	Not an issue
New Hampshire	Local level
North Dakota	
Oklahoma	Not an issue
Oregon	
Pennsylvania	
South Dakota	Local level. Opted not to-more harm than good
Washington	
Wyoming	

Zoning Statutes State	Type of Community Facility	Number of Residents	Type	Conditional Use Permits	State Licensing Required	of Facilities Licensor	Dispersal of Facilities Required
ARIZ. Rev. Stat., S36-581, 582	<u>Residential Facility</u>	6 or fewer	developmentally disabled persons	yes	yes	not specified	1,200 ft. radius
	Apts./rooms zone	7 or more					
CALIF. Welf. & Inst. Code S5515-5516	family care foster, group home	6 or fewer	mentally disordered or otherwise handicapped persons or dependent and neglected children	yes	yes	not specified	not specified
COLO. Rev. Stat. S30-28-115, S2710.5-133	group home	8	developmentally disabled persons	yes	yes	Health Dept.	750 ft. between facilities
CONN. Chap. 124, Sec. 8-3e, Conn. Code	community residence	6 or fewer and 2 staff	mentally retarded	not specified	yes	not specified	not specified
D.C. Zoning Comm. Regs., 7/9/81 pursuant to D.C. Code Sec. 5-413 et seq.	community-based residential facilities	up to 4, plus supervisor and family-R-1	mentally retarded	special exception special exception			none in same square or 1,000-ft. radius none in same square or 500-ft radius none in same square or 1,000-ft. radius
		5-8 in R-1					
		5-8 in R-2					
		9-15 in R-2-R-4					
		more than 15 in R-1 and R-2					
more than 15 in R-1 and R-2	special exception	none in same square or 500-ft. radius					

Zoning Statutes State	Type of Community Facility	Number of Residents	Type	Conditional Use Permits	State Licensing Required	of Facilities Licensor	Dispersal of Facilities Required
DEL. Ch. 390, Laws of 1979, amending Title 9, Ch. 26, 49, 68 and Title 2, Ch. 3, Del. Code	residential	10 or fewer	developmentally disabled persons	not specified	yes	not specified	5,000-ft. radius
FLA. Sec. 163, 3177(6)(f), Stats.	group and foster homes						
HI. Chap. 46, Rev. Stat., 1982 Suppl.	group home	8 or fewer plus 2 supervisory staff	developmentally disabled	yes	not specified	not specified	not specified
ID. Chap. 65, Title 67, Secs. 6530-6532	group home	8 or fewer staff	mentally and/or plus 2 handicapped	no physically	yes	Dept. of Health	not specified and Welfare
IND. Sec. 16-10 2.1, Code	group home	8 or fewer plus 2 staff	developmentally disabled persons	not specified	yes	DD residential facilities council	3,000 ft. between group homes
IA. Ch. 358A.25, Code 1983. Ch. 414.22, Code 1983	family home	8 or fewer, and support personnel	developmentally disabled		yes		$\frac{1}{2}$ mile for new family home
IA. Tit. 28, Ch. 4, Rev. Stat., Secs. 475-478	group home	6 or fewer plus 2 staff	mentally and physically handicapped	not specified	yes	Health & Human Resources Dept.	1,000-ft. radius

Zoning Statutes State	Type of Community Facility	Number of Residents	Type	Conditional Use Permits	State Licensing Required	of Facilities Licensor	Dispersal of Facilities Required
MD. Ann. Code, 1977 Replacement Vol. & 1977 Suppl., Art. 59A	group home	4-8	mentally retarded	not specified	yes	Health & Mental Hygiene Dept.	not specified
ME. Chap. 640, Laws of 1982	group home	8 or fewer	mental handicaps or developmental disabilities	no	not specified		1,500-ft. dispersal limit; no excessive density
MICH. Act Nos. 394-396 Public Acts of 1976 (Jan. 3, 1977)	residential facility	6 or fewer	persons in need of supervision or care	yes	yes	Dir., Dept. of Social Services	1,500 ft. (3,000 ft. in cities over 1 million pop.) between facilities unless permitted by local ordinance
MINN. Stat. S462.357(7)-(8); 252.28	group home, foster home residential facility	6 or fewer 7 - 16	mentally retarded or physically handicapped persons	not specified yes	yes	Public Welfare Commissioner	300 ft. between facilities unless conditional use permit granted
MO. Sec. 89.020, Mo. Rev. Stat., 1978	group home	8 or fewer plus 2 houseparents or guardians	mentally retarded or physically handicapped persons	no	not specified		may establish reasonable density standards
MONT. Rev. Code S11.2702	group, foster or other home	8 or fewer	developmentally disabled or handicapped persons	yes	yes	Dept. of Health & Envir. Sci. & Dept. of Soc. & Rehab.	not specified
N.C. Ch. 168 G. 5., as amended, 1981	family care home	6 or fewer plus supervisory and support personnel	temporary or physical, mental, or emotional disability	not allowed	not specified		½ mile radius

Zoning Statutes State	Type of Community Facility	Number of Residents	Type	Conditional Use Permits	State Licensing Required	of Facilities Licensor	Dispersal of Facilities Required
NEB. S. 18-1744 1747, Neb. Rev. Stats., 1980 Suppl.	group home	4-8 plus resident managers	mentally retarded, cerebral palsy, autism	yes, if within 1,200 ft.	yes	Health Dept.	metropolitan area- $\frac{1}{2}$ mile population (variances permissible) 1,000 or fewer - 1 1,001-9,999-1 for every 2,000 residents 10,000-49,000-1 for every 3,000 residents 50,000-249,999-1 for every 10,000 residents 250,000 or more-1 for every 20,000
NEV. Ch. 154, Laws of 1981	community residential facility	6 or fewer plus 2 houseparents	mentally retarded	not specified	not specified	not specified	not specified
N.J. Ch. 159, S40:55D, Laws of 1978	group home, half-way house, ICF	15 or fewer	developmentally disabled or mentally ill	yes, if more than 6 persons	yes	Dept. of Human Services	1,500 ft.; density limit of 50 persons or .5% of total pop. of municipality
N.M. H.B. 472 (Apr. 7, 1977)	community residences	10 or fewer	not specified	not specified	yes	not specified	not specified
N.Y. Ch. 468, S41.34, Laws of 1978	community residential facility	4-14	mentally disabled	not specified	yes	Office of Mental Health or Office of Mental Retardation & Developmental Disabilities	no concentration that substantially alters character of areas

Zoning Statutes State	Type of Community Facility	Number of Residents	Type	Conditional Use Permits	State Licensing Required	of Facilities Licensor	Dispersal of Facilities Required
OHIO Am. Sub. S.B. No. 71 (Aug. 1, 1977)	family home	8 or fewer	developmentally disabled persons	not specified	yes	Chief of Division of Mental Retardation	not specified
R.I. S.B. 918 (May 13, 1977)	any type of residence	6 or fewer	children of adults	not specified	no		not specified
S.C. Act 449 of 1978 (Apr. 4, 1978)	residential facility	9 or fewer	mentally handicapped	not specified	yes	Dept. of Mental Retardation or Dept. of Mental Health	yes
TENN. S.B. 894 (Apr., 1978)	group home	8 or fewer plus 2 houseparents	mentally retarded & physically handicapped	not specified	not specified	not specified	not specified
TEX. S.B. 940 1985	family home	6 or fewer plus 2 supervisors	mental or physical impairments	no	yes	Dept. of Mental Health and Retardation	Dispersal limit of $\frac{1}{2}$ mile from existing family home; automobile density limit of 1 per bedroom
UTAH Secs. 10-9-2.5, and 17-27-11.5, Utah Code Ann. 1953	residential facility	8 or fewer plus houseparents or managers	handicapped persons	yes	yes	Dept. of Social Services	1 mile
VA. Code S15.1-486.2	family care, foster group home	8 or fewer	mentally retarded & other developmentally disabled persons	yes	not specified		proportional to pop. & population density in state

Zoning Statutes State	Type of Community Facility	Number of Residents	Type	Conditional Use Permits	State Licensing Required	of Facilities Licensor	Dispersal of Facilities Required
VT. 24 V.S.A. S4409 (d)	community care or group home	6 or fewer	developmentally disabled & physically handicapped	not specified	yes		1,000 ft. between facilities
W.VA. Chap. 8, Art. 24, Sec. 50b; Art. 17, Sec. 2, Code, 1731, as amended	residential facility	8 or fewer and 3 supervisors	developmentally disabled and mentally ill	yes for more than 1 development- ally disabled and 3 supervisors, or persons with behavioral disabilities	yes	Health Dept.	1,200 ft. dispersal limit outside city, 1 per block face inside city for mentally ill
WIS. Ch. 205, Laws of 1977	community residences foster home for children	1-16 or more 1 - 4	persons in need of supervision	not specified	yes	Health & Social Services Dept.	2,500 ft. between facilities unless permitted by local exception; also density limit (total capacity of 25 persons, or 1% of pop., whichever is greater)

From (in part) American Bar Association, Developmental Disabilities State Legislative Project (Washington, D.C., 1978)

Ariz., Col., Del., Fla., Hawaii, Idaho, Ind., Iowa, La., Maine, Md., Mo., Neb., Nev., N.C., N.Y., S.C., Tenn., Utah, Vt., Va., W.Va., Wis., and D.C. added
by author.